CHAN BENG TIOW

v.

KOK MEI MOOI

COURT OF APPEAL, PUTRAJAYA
MOKHTAR SIDIN JCA
MOHD NOOR AHMAD JCA
MOHD GHAZALI YUSOFF JCA
[CIVIL APPEAL NO: A-02-514-2000]
5 JANUARY 2005

FAMILY LAW: *Financial obligation - Maintenance of spouse - Assessment of maintenance - Principles and considerations - Means and needs of parties - 47-year-old unemployed wife - Husband having less than RM500 of disposable income monthly - Whether maintenance payments ordered by High Court reasonable - Law Reform (Marriage and Divorce) Act 1976, s. 78*

FAMILY LAW: *Matrimonial property - Division of property - Principles and considerations - Extent of wife's contributions to welfare of family - Looking after home and/or caring for family - Whether years of marriage relevant - Whether order of High Court giving wife a 40% interest in matrimonial home reasonable - Law Reform (Marriage and Divorce) Act 1976, s. 76(3) & (4)*

This was an appeal by the petitioner/husband from the orders of the High Court made pursuant to his petition for the dissolution of his marriage to the respondent/wife. The High Court had ordered, inter alia, that the petitioner pay or transfer to the respondent: (i) a monthly maintenance sum of RM500; (ii) a 40% interest in the matrimonial home; (iii) 40% of his provident fund; and (iv) 30% of his gratuity. By consent, the petitioner was also ordered to pay a total monthly sum of RM1,500 as maintenance for three of his four children. Aggrieved, the petitioner appealed to the Court of Appeal against items (i) and (ii) of the award. In respect of item (i), it was submitted that such an order would leave the petitioner with less than RM500 of disposable income monthly. In respect of item (ii), the petitioner argued that the statutory criterion for the division of the matrimonial home should be 'the contribution of the respondent towards the welfare of the family' and not the '23 long years of marriage' which seemed to have been the measure used by the High Court.

Held (dismissing the appeal)
Per Mohd Ghazali Yusoff JCA delivering the judgment of the court:

[1] The respondent was 47 years' old and unemployed at the material time. Thus, it was reasonable, considering the "means and needs of the parties" as espoused in s. 78 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act'), for the High Court to have awarded the respondent a monthly maintenance sum of RM500. Further, the High Court had also given the petitioner the liberty to apply to have the maintenance order varied or rescinded upon his retirement and/or the graduation of his second child. Hence, the order for maintenance made by the High Court was good. (p 663 b-d)

[2] Since the parties were married some 20 years ago, the respondent had looked after the matrimonial home; and she had also assumed the responsibility of caring for the whole family, including the four children of the marriage and, at times, the petitioner's parents. This contribution clearly fell within the contemplation of s. 76(3) and (4) of the Act, and the High Court was right in giving due consideration to it. Hence, the order of the High Court giving the respondent a 40% interest in the matrimonial home was proper. (pp 664 h & 665 a-c)

[Orders of High Court affirmed; parties to bear own costs.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah rayuan oleh pempetisyen/suami terhadap perintah-perintah Mahkamah Tinggi yang dibuat berikutan petisyennya bagi membubarkan perkahwinannya dengan responden/isterinya. Mahkamah Tinggi, antara lain, memerintahkan supaya pempetisyen membayar atau memindahkan kepada responden: (i) nafkah bulanan sebanyak RM500; (ii) 40% kepentingan ke atas rumah kelamin; (iii) 30% daripada gratuitinya. Melalui persetujuan, pempetisyen juga diperintah untuk membayar sejumlah RM1,500 sebulan sebagai nafkah untuk tiga dari empat anaknya. Terkilan, pempetisyen merayu ke Mahkamah Rayuan terhadap perkara-perkara (i) dan (ii) award. Berkaitan perkara (i), ianya dihujahkan bahawa perintah sedemikian akan meninggalkan pempetisyen dengan pendapatan hanya RM500 sebulan untuk berbelanja. Berkaitan perkara (ii), pempetisyen bertegas bahawa kriteria statut bagi pembahagian rumah kelamin harus mengandungi 'sumbangan responden terhadap kebajikan keluarga' dan bukannya 'tempoh perkahwinan selama 23 tahun' yang kelihatan diambil sebagai kayu ukur oleh Mahkamah Tinggi.

Diputuskan (menolak rayuan)
Oleh Mohd Ghazali Yusoff HMR menyampaikan penghakiman mahkamah:

[1] Responden berumur 47 tahun dan menganggur pada waktu material. Ianya dengan itu munasabah, mengambil kira "kemampuan dan keperluan pihak-pihak" sepertimana kehendak s. 78 Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta'), bagi mahkamah untuk mengawardkan responden nafkah bulanan sebanyak RM500. Lagipun, Mahkamah Tinggi telah memberikan kebebasan kepada pempetisyen untuk memohon supaya perintah nafkah tersebut dipinda atau dibatalkan apabila beliau dipencenkan atau setelah anak keduanya memperoleh ijazah. Dengan itu, perintah nafkah yang dibuat oleh Mahkamah Tinggi adalah wajar.

[2] Responden telah menjaga rumah kelamin sejak pihak-pihak berkahwin 20 tahun yang lampau; dan beliau juga memikul tanggungjawab menjaga kebajikan seluruh keluarga, termasuk keempat-empat anak mereka dan, pada masa-masa tertentu, ibu bapa pempetisyen. Sumbangan ini adalah termasuk di dalam jangkauan s. 76(3) dan (4) Akta, dan Mahkamah Tinggi dengan itu betul apabila memberi pertimbangan sewajarnya kepada hal tersebut. Dengan demikian, perintah Mahkamah Tinggi memberikan responden 40% kepentingan di dalam rumah kelamin adalah wajar.

Perintah Mahkamah Tinggi disahkan; pihak-pihak menganggung kos masing-masing.]

Legislation referred to:
Law Reform (Marriage and Divorce) Act 1976, ss. 76(3), (4), 78

For the appellant/petitioner - Leong Check Keng; M/s Leong & Tan
For the respondent - Ravi Nekoo; M/s Nekoo Parames & Tung

[Appeal from High Court, Ipoh; Divorce Petition No: 33-63-1999]

Reported by Gan Peng Chiang

JUDGMENT

Mohd Ghazali Yusoff JCA:
The appellant filed this petition on 11 March 1999 and prayed for, *inter alia*, that his marriage with the respondent be dissolved on the ground that the marriage has broken down irretrievably. The marriage was registered on 26 January 1977.

There are four children from the marriage, namely:

(i) Chan Wai Leng (f) (date of birth – 3 November 1978);

(ii) Chan Weng Yew (date of birth – 10 January 1981)

(iii) Chan Wai Sarn (f) (date of birth – 15 December 1982); and

(iv) Chan Wai Yi (f) ((date of birth – 7 December 1987).

The appellant also prayed for an order that he be given custody and guardianship of the 3rd and 4th child.

A decree nisi was granted on 18 January 2000 by the learned judge, High Court, Ipoh. It was ordered, by consent, that the parties be granted joint custody of the 3rd and 4th child with the respondent having care and control thereof and the appellant having liberal access thereto. The appellant was also ordered to pay RM200 per month as interim maintenance to the respondent commencing 18 January 2000.

Subsequently, on 28 June 2000 the appellant was ordered by the court to, *inter alia*, pay to the respondent the following:

(a) 40% of his employment provident fund;

(b) 30% of his gratuity;

(c) a monthly maintenance of RM500.

He was further ordered to transfer 40% interest of the matrimonial home to the respondent. By consent, he was ordered to pay a sum of RM1,500 per month as maintenance for three children of the marriage who were still schooling or pursuing further education at that material time.

The appellant, being dissatisfied with the decision of the learned judge appealed to this court. We dismissed the appeal and ordered that each party was to bear its own costs and that the deposit be refunded to the appellant.

At the outset of the appeal, learned counsel for the appellant informed the court that the appeal was confined to only the following:

(a) the order relating to the monthly maintenance of RM500 to be paid to the respondent commencing 1 July 2000;

(b) the order relating to the division of the matrimonial home.

In his grounds of decision in relation to the monthly maintenance of RM500 to be paid to the respondent, the following was what the learned judge said:

> Faktor 'kemampuan dan keperluan' kedua-dua pihak seperti yang dinyatakan dalam s. 78 Law Reform (Marriage and Divorce) Act 1976, adalah menjadi asas bagi Mahkamah ini membenarkan satu amaun yang munasabah sebagai nafkah yang perlu diberikan kepada responden. (Lihat kes *Leow Kooi Wah v. Ng Kok Seng* [1995] 1 MLJ 853). Seksyen 78 disalinkan untuk kesenangan rujukan.
>
> **78. Assessment of maintenance**
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> In determining the amount of any maintenance to be paid by a man to his wife or former wife or by a woman to her husband or former husband, the court shall base its assessment primarily on the means and needs of the parties, regardless of the proportion such maintenance bears to the income of the husband or wife as the case may be, but shall have regard to the degree of responsibility which the court apportions to each party for the breakdown of the marriage.

After taking into account that the appellant was earning an income of RM3,179 per month at the material time, the amount of maintenance for three children of the marriage who were still schooling or pursuing further education, the fact that she has to look after two school-going children who were living with her, the fact that the respondent was not gainfully employed and her claim that she would need RM800 for her monthly expenses and the fact that she used to be an insurance agent and hence was in a position to look for work in that field, the learned judge said:

> Dengan mengambilkira segala faktor-faktor yang disebutkan diatas saya memutuskan agar nafkah RM500 sebulan mulai 1.7.2000 dibayar oleh pempetisyen kepada responden, dengan kebebasan untuk memohon kepada kedua-dua pihak. Dalam menetapkan amaun RM500 sebulan ini Mahkamah juga telah mengambilkira bahawa pempetisyen akan tidak lagi membayar nafkah RM500 sebulan kepada anak sulungnya yang kini berumur 22 tahun dan menamatkan pelajaran tingginya dalam masa yang singkat. Oleh itu pembayaran nafkah RM500 sebulan kepada responden tidak akan menjadi satu bebanan tambahan kepada pempetisyen.

In his written submission, learned counsel for the appellant contended that by awarding maintenance in the sum of RM500 per month to be paid to the respondent and taking into account the sum of RM1,500 which he has to pay for maintenance of three children of the marriage who were pursuing further education or still schooling, the court is leaving the appellant with less than RM500 of disposable income. Counsel argued this goes against the principle

laid down in s. 78 of the Law Reform (Marriage and Divorce) Act 1976 ("the Act") where the "means and needs" of the appellant must be taken into account. Further, the court seemed to have placed no weight on the fact that the appellant was due to retire on 4 December 2000.

We find no merits in the arguments canvassed above. The respondent was approximately 47 years old at the material time when the order for maintenance was made. She was also unemployed. Under the circumstances, we find that the sum of RM500 awarded for maintenance is reasonable. We have also noted that the learned judge was aware that the appellant would be retiring on 4 December 2000. In his order, the learned judge has given the liberty for either of the party to apply to vary or rescind the order for maintenance. The appellant would have retired by now and as such will now be in a position to apply to vary or rescind the order. Furthermore, the second child of the marriage should have completed her further studies by now and as such the appellant will also be in a position to apply to vary or rescind the consent order in relation to her maintenance. It is our view that the learned judge did not err in law or in fact in ordering a monthly maintenance of RM500 to be paid by the appellant to the respondent.

In his grounds of judgment in relation to the division of the matrimonial home (hereafter referred to as "the said property"), the learned judge noted that the marriage lasted 23 years. The facts showed that the appellant was the registered owner since 1977 and it was the appellant's father who made the initial payment towards the purchase of the said property.

In his written submission, learned counsel for the appellant contended that "the judge decided to apportion 40% of the matrimonial home to the respondent based on the long years of marriage of 23 years". He argued "it is the contribution by the respondent towards the welfare of the family which is the criterion for division laid down by the statute, and not the years of marriage, *per se*".

We are of the view that the above contention is without merits. In relation to this issue, the learned judge said in his grounds of decision as follows:

> Walaupun responden sendiri tidak membayar terhadap rumah kelamin tersebut, tetapi sumbangan beliau sebagai seorang ibu dan isteri selama 23 tahun tidak dipertikaikan. Faktor ini menjadi asas bagi Mahkamah membuat pembahagian. Malah, semasa memberi keterangan, pempetisyen sendiri sanggup mempertimbangkan pembahagian sebanyak 50% daripada rumah kelamin itu kepada responden. Rumah itu kini didiami oleh responden dan dua orang anak kedua-dua pihak. Responden kini tidak mempunyai sebarang pekerjaan. Saya

berpendapat bahawa responden layak kepada 40% dalam rumah kelamin tersebut dan juga memerintahkan agar beliau dibenarkan terus kekal mendiami dalam rumah itu bersama kedua-dua anak mereka yang belum mencapai umur dewasa. Rumah tersebut dianggarkan bernilai RM48,000 pada masa kini. Mahkamah juga telah memerintahkan supaya rumah itu boleh dijual jika kedua-dua pihak bersetuju berbuat demikian. Dalam membuat pembahagian ini Mahkamah berpandukan faktor 'pembahagian samarata' yang ditetapkan dalam s. 76 Law Reform (Marriage and Divorce) Act 1976.

Section 76 of the Act entitled "Power for court to order division of matrimonial assets", *inter alia*, reads:

(3) The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired during the marriage by the sole effort of one party to the marriage or the sale of any such assets and the division between the parties of the proceeds of sale.

(4) In exercising the power conferred by subsection (3) the court shall have regard to:

(a) the extent of the contributions made by the other party who did not acquire the assets to the welfare of the family by looking after the home or caring for the family;

(b) the needs of the minor children, if any, of the marriage;

and subject to those considerations, the court may divide the assets or the proceeds of sale in such proportions as the court thinks reasonable; but in any case the party by whose effort the assets were acquired shall receive a greater proportion.

In his evidence, the appellant stated, inter alia, as follows:

(a) "My proposal is to give her ½ of the house";

(b) "I can consider 50% of the house ... ";

From our reading, the appellant seems to be willing to transfer 50% of the said property to the respondent. Be that as it may, the evidence showed that the respondent has looked after the said property since the parties were married. The burden of caring for the family, including at certain times, her parents in law fell upon the respondent. Under the circumstances, we would think that the learned judge was right in giving due consideration to her contribution in this form. This form of contribution clearly falls within the

contemplation of the provisions of s. 76 of the Act. The respondent looked after the said property and had taken care of the four children of the marriage. There is nothing to suggest that she did not behave as a mother to the children and up to the date of the trial, at least two of the children who were below the age of majority were staying with her. The extent of the contributions she made to the welfare of the family by looking after the said property and caring for the family and at times looking after her parents in law would surely entitle her to receive a proportion of the said property. The learned judge has ordered that the appellant transfer 40% interest in the said property. We cannot find anything erroneous with that order based upon the evidence before him.

Since there is nothing to show that the above orders were bad on the face of it, we find no reason to differ from the learned judge's decision and accordingly dismissed this appeal and ordered that each party was to bear its own costs and that the deposit be refunded to the appellant.